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No. 87-1048

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY LEMAIRE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND MBANK ABILENE, N.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
DOUGLAS LETTER
BARBARA C. BIDDLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether 12 U.S.C. 91 prohibits attachment of the assets of a national bank prior to the entry of a final judgment against the bank from which no further appeal lies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App 3a-12a) is reported at 826 F.2d 837. The opinion of the district court (Pet. App. 13a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1987. A petition for rehearing was denied on October 9, 1987. The petition for a writ of certiorari was filed on December 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984 petitioners brought an action in Texas state court against respondent MBank Abilene, N.A. (MBank), alleging, among other things, breach of contract, fraud, and tortious interference with contract. Following a jury

verdict for petitioners, the trial court entered judgment against MBank for an amount in excess of $69 million. While the trial court initially stayed enforcement of the judgment, in September 1986 the court withdrew the stay order. Pet. App. 5a.

MBank did not post the $69 million supersedeas bond that was required by Texas law to stay execution of the judgment pending appeal.[1] The bank did, however, petition both the Texas Court of Appeals and the Texas Supreme Court for writs of mandamus directing the trial court to stay execution of the judgment until the appeals process was exhausted; in making this request, MBank pointed to 12 U.S.C. 91, which provides that "no attachment, injunction, or execution, shall be issued against [a national bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." Both courts denied MBank's petitions without comment. Pet. App. 5a.

On September 18, 1986, the state trial court denied MBank's motion for a new trial. That same day, petitioners caused writs of garnishment to be served on MBank's assets located in the Federal Reserve Bank of Dallas and in MBank Dallas, a subsidiary of MBank's parent holding company. The writs prevented the clearance through the Federal Reserve System of checks presented to MBank, leading to a severe imbalance in MBank's accounts and the probability of imminent insolvency. Pet. App. 4a, 24a-25a, 28a.

2. In response to these developments, the United States, acting on behalf of the Comptroller of the Currency (Comptroller) and the Federal Deposit Insurance Cor-

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[1] Texas law requires the filing of a supersedeas bond equal to the entire amount of the judgment. Tex. R. Civ. P. Ann. rr. 364-368 (Vernon 1985).

poration (FDIC), brought this action against petitioners and MBank in the United States District Court for the Northern District of Texas. Citing 12 U.S.C. 91, the United States sought an injunction against execution of the writs of attachment pending exhaustion of MBank's appellate remedies in state court. In October 1986 the district court granted the requested relief, holding that Section 91 bars the attachment of national bank assets until the entry of a final judgment against the bank from which no further appeal may be taken. Noting that the meaning of the term "final judgment" in Section 91 presented a question of first impression, the court found it "clear that Congress intended 12 U.S.C. § 91 to prohibit premature attachment of bank assets by one of its creditors," and that "[a] finding that 'final judgment' means one from which no further appeal can be taken would promote the settled congressional intent" (Pet. App. 21a). The court went on to find that failure to grant an injunction against execution of the writs of attachment would likely lead to MBank's immediate insolvency, a development that would cause irreparable harm to the Comptroller and the FDIC (see Pet. App. 24a-27a), and that "would certainly disserve [the] public interest" (*id.* at 28a).

The court of appeals affirmed (Pet. App. 3a-12a). The court explained that the only question in this case is whether the term "final judgment" in Section 91 bars the attachment of national bank assets prior to entry of a judgment on the merits by the trial court, or whether the term instead more broadly bars such attachments until all appeals have been exhausted. In answering this question, the court of appeals noted a variety of settings in which Congress has used the term "final judgment" in the second sense (see Pet. App. 7a), and it explained that a Congress roughly contemporaneous with the one that enacted Section 91 used the phrase in a similar way (see Pet. App.

8a). The court therefore found it "axiomatic that the meaning of final judgment varies according to context" (*id.* at 7a).

Here, the court found the controlling context in the background and purposes of the statute. The court explained that the anti-attachment provision was added in 1873 to an existing portion of Section 91 that "relat[ed] to preferential transfers and to acts in contemplation of in[s]olvency" (Pet. App. 9a (footnote omitted)). Looking to this background, and to this Court's decisions construing Section 91, the court of appeals concluded that the anti-attachment provision was enacted "to prevent preference or priority of claims against national banks by seizure under state authority before final adjudication of claims, and to protect the banks from the crippling effects of such seizures" (Pet. App. 10a-11a, citing *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 321 n.13 (1977)). The court therefore held that "Congress intended to and did arm the Comptroller with the lorica of an absolute proscription against the seizure of the property of a national bank before a judgment against that institution had completed the appellate process" (Pet. App. 11a).

ARGUMENT

The only question in this case is whether 12 U.S.C. 91 bars the attachment of national bank assets only until the entry of a judgment on the merits by a trial court, or whether it instead applies until the completion of the appeals process. In choosing the latter interpretation, the courts below read the statute in a manner that is entirely consistent with its language and fully implements the congressional purposes. Moreover, as petitioners recognize (Pet. 8), the question is one of first impression. Further review plainly is not warranted.

1. Petitioners argue that the term "final judgment" is generally used to signify a trial court judgment on the merits (Pet. 22-25), and they attempt to find support for this proposition in the Court's occasional description of Section 91 as prohibiting "prejudgment" attachment (Pet. 12-15). But "final judgment" is not a self-defining term. As the court of appeals noted, both Congress and this Court have often used the term to refer to a judgment that is no longer subject to appellate review, either because the appellate process has been completed or because the time for seeking review has expired. Pet. App. 7a, citing 28 U.S.C. 2412(d) (Equal Access to Justice Act); 46 U.S.C. 741, 748 (Suits in Admiralty Act); 15 U.S.C. 16(a) (Clayton Act). See 28 U.S.C. 2006 and 2414; *Schell* v. *Cochran*, 107 U.S. 625 (1883); *Russell* v. *National Mediation Board*, 764 F.2d 341, withdrawn on other grounds, 775 F.2d 1284 (5th Cir. 1985); *McDonald* v. *Schweiker*, 726 F.2d 311 (7th Cir. 1983); *Illinois* v. *Sperry Rand Corp.*, 237 F. Supp. 520 (N.D. Ill. 1965). Cf. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696, 711 n.14 (1974). And this Court's past references to the "prejudgment" application of Section 91 were not addressed to, and do not, resolve when the "judgment" is deemed to have become "final."[2]

In these circumstances, the meaning of "final judgment" " 'must be determined in context.' " *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312, 321 (1977) (citation omitted). Here, that context is provided by the background and purposes of Section 91. As the Court has

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[2] The Court has considered Section 91 on four occasions. *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312 (1977); *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554 (1905); *Earle* v. *Pennsylvania*, 178 U.S. 449 (1900); *Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721 (1888). None of those decisions addressed the question of when Section 91's prohibition on attachment terminates.

explained, the anti-attachment provision was added to Section 91 in 1873, a time of financial panic that was marked by a number of bank failures (see 432 U.S. at 317, 322); the anti-attachment provision was appended by the compilers of the first revised statutes to an existing statute that prohibited preferential transfers in contemplation of insolvency (see *id.* at 317-318, 322-323). These factors have led the Court to conclude (*id.* at 321 n.13 (citation omitted)) that

> "The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under State authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by Congress are to control their own assets and resources, as against State interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment."

As the facts of this case illustrate, this policy is best fulfilled by reading Section 91 as the courts below did. As the district court explained, allowing execution of petitioners' writs could lead to the premature insolvency of MBank. And "[a] subsequent reversal or modification of that judgment by a Texas appellate court [would] be of little avail. The bank may already be insolvent and the bank's depositors and creditors [would] yield to a preference accorded to [petitioners]" (Pet. App. 22a). Immediate enforcement of the Texas trial court's judgment also would cause other, related problems that could not be remedied by reversal on appeal: insolvency would require the FDIC to pay insurance or take other steps to protect MBank's depositors, would harm "the community at large" (*id.* at 25a), and "would cause the public to lose fur-

ther confidence in the banking system" (*id.* at 28a). And once the bank became insolvent, even a reversal on appeal could not "restore the public's confidence in MBank Abilene;" "[a]s a practical matter, it would be impossible to reconstitute and reopen the bank" (*id.* at 26a). These are precisely the dangers that Congress intended to avoid when it enacted the anti-attachment provisions of Section 91.[3]

2. Petitioners' remaining contentions also lack substance. Petitioners maintain (Pet. 16-22) that Section 91 should not be interpreted "in derogation" of state law requiring the posting of supersedeas bonds. But petitioners are incorrect in presuming that Congress intended to permit the unfettered application of state law to national banks; in fact, it has long been understood that "[n]ational banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character * * * and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the [Federal] Government may permit." *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554, 557 (1905). In any event, the plain language of Section 91, by "writ[ing] into

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[3] Petitioners assert (Pet. 25-26) that the decision below accords MBank's depositors and other creditors a preference over *them*. But there can be no preference unless the bank is insolvent, which is not the case unless the petitioners' judgment is valid. Section 91 prevents a creditor from precipitating a crisis before the validity of his claim is finally established. Allowing the bank to do business in the ordinary course in the interim should not prejudice such a creditor. Petitioners also attempt (Pet. 9-11) to find support in *Third Nat'l Bank* v. *Impac Limited, Inc.*, 432 U.S. 312 (1977). That decision, however, held only that Section 91 does not prevent the debtor of a bank from obtaining injunctive relief against the wrongful foreclosure of its property (see 432 U.S. at 313, 324). In contrast, the Court made it clear in *Third Nat'l Bank* that the statute does "prevent[] prejudgment seizure of *bank* property by creditors of the bank" (*id.* at 324 (emphasis added); see *id.* at 323).

all state attachment laws an exception in favor of national banks" (*Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721, 726 (1888)), displaces any state law that would permit the attachment of national bank assets prior to the entry of final judgment.

Similarly, petitioners are wrong in challenging (Pet. 27-29) the jurisdiction of the district court to entertain the government's suit. Petitioners rely on this Court's decisions in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), and *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). But both of those decisions involved attempts by unsuccessful state court litigants to bring federal court challenges to the substance of the state court decisions. In both cases, this Court held that *it* was the only federal forum that could review the correctness of state court decisions. Here, in contrast, the federal suit was brought by the United States, which was not a party to the state action. And the federal suit does not challenge the merits of the state adjudication; it seeks only to enforce a federal statutory bar pending completion of the state appellate proceedings. No decision of this Court suggests that the district courts lack jurisdiction to entertain such actions. See *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6, 1987), slip op. 15-16 (Scalia, J., concurring); *id.* at 4 (Brennan, J., concurring in the judgment); *id.* at 1 (Blackmun, J., concurring in the judgment); *id.* at 2 n.3 (Stevens, J., concurring in the judgment).[4]

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[4] Similarly, this case is not controlled by the Court's decision in *Pennzoil Co.* v. *Texaco, Inc.*, *supra*, as petitioners appear to suggest (Pet. 28-29). In that case, the Court held that a federal district court should have abstained when the losing state court litigant presented it with a constitutional challenge to the Texas supersedeas bond requirement. There, however, the losing litigant did not present its federal challenge to the Texas courts (see slip op. 9-10, 12-14 & n.16); here,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General
DOUGLAS LETTER
BARBARA C. BIDDLE
Attorneys

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MBank unsuccessfully sought relief under Section 91 from the Texas trial court, Court of Appeals, and Supreme Court. And here, of course, the federal suit was brought by the United States, which was not a party to the state court proceedings.

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